Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

October Term, 2000

Marvin Ray Riley, *Petitioner*

v.

R.Q. Hickman, et. al., *Respondents*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Dean R. Johansson, Esq.
Counsel of Record

John R. Hargreaves, Esq.
Counsel for Petitioner

Hargreaves & Johansson
926 J Street, Suite 1119
Sacramento, CA 95814
(916) 930-9646

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QUESTION PRESENTED

Whether the circuit court of appeals was required to grant petitioner a certificate of appealability under 28 U.S.C. §2253, subdivision (c)(2), providing that a certificate is issued only if the petitioner has "made a substantial showing of the denial of a constitutional right," based on the factual findings of the district court pertaining to petitioner's plea agreement.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2000

MARVIN RAY RILEY, *Petitioner*

v.

R.Q. HICKMAN, *et. al., Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Marvin Ray Riley respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

Attached to this petition are (1) the order of the circuit court of appeals denying petitioner a certificate of appealability (App. "B", *infra,* 3a-4a); (2) the order of the district court denying petitioner a certificate of appealability (App. "C", *infra,* 5a-7a); (3) the order and judgment of the district court denying petitioner's application for a writ of habeas corpus (App. "D",

infra, 8a-11a), and (4) the magistrate's findings and recommendations to the district judge on petitioner's application for writ of habeas corpus (App. "E", *infra,* 12a-16a).

JURISDICTION

The court of appeals entered its judgment on November 3, 1999. (App. "B", *infra,* 3a-4a.) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Subdivision (c)(2) of 28 U.S.C. §2253 provides that a certificate of appealability shall be issued only if the petitioner has "made a substantial showing of the denial of a constitutional right." (App. "A", *infra,* 1a-2a.)

STATEMENT

On November 13, 1994, the District Attorney for Yolo County, California, charged petitioner with various crimes, including *inter alia*, burglary, first degree robbery, rape, and oral copulation by force or violence.

Before a preliminary hearing was held, the parties reached a negotiated disposition and petitioner plead no contest to robbery

in violation of Penal Code sections 211 and 212.5, oral copulation by force in violation of Penal Code section 288a, subdivision (c), and rape in violation of Penal Code section 261, subidivision (a)(2). Petitioner also admitted an elderly victim enhancement pursuant to Penal Code section 667.9, subdivision (a), two deadly weapon use enhancements pursuant to Penal Code section 12022.3, subdivision (a), and one prior serious felony conviction resulting in a doubling of the sentence on each of the three counts, pursuant to section 667, subdivision (a)(1).

A. <u>The Final Provision Of Petitioner's Plea Agreement</u>

Under the plea agreement, the parties agreed that petitioner would receive a 40-year prison term, provided, however, that his sentence would be reduced by 10 years if he fulfilled certain conditions set forth in the final provision:

> I agree to cooperate with law enforcement by identifying the two other participants in this crime and helping locate them and obtaining statements as required (prextext phonecall). I will further cooperate by providing a full statement concerning

> the facts of the robbery and rape of Lucy [K.] and any follow up interviews by law enforcement as may be needed. I agree to testify at the trial of all other participants of this crime.
>
> In exchange for my cooperation my forty year sentence will be reduced by ten years to thirty years when the following occurs; corroboration regarding the identity of my accomplices by way of physical evidence in the form of fingerprints, the rape kit or other undiscovered evidence or a confession by the accomplice(s) and I testify at the trial if necessary. I agree to waive time for sentencing for at least twelve weeks or after the trial of my accomplices if necessary.

After petitioner entered a plea of no contest, he provided a statement as required by his plea agreement. Petitioner stated that he, his wife, and his two cousins, Henry Johnson ("Johnson") and Jacob Backer ("Backer"), drove from Sea Ranch, California to West Sacramento, ingesting

methamphetamine along the way. When they arrived in West Sacramento, petitioner and two cousins dropped off petitioner's wife at her mother's residence, then headed to Dunnigan. When they arrived in Dunnigan, they parked a short distance away from the trailer of the victim. Petitioner and Backer walked towards the trailer, while Johnson remained in the car. Backer entered first and petitioner followed a few minutes later. When petitioner entered the trailer he saw Backer binding the victim. Petitioner helped Backer bind her with tape, then went to the living room to look for valuables. Petitioner then left the trailer, returned to the car and woke Johnson while Backer remained in the trailer. During the statement, petitioner admitted his participation in the robbery of the victim, but denied sexually assaulting her.

Before sentencing, a hearing was held to determine whether petitioner would receive the ten-year sentence reduction contemplated by the plea agreement. At the hearing, petitioner presented the testimony of his 15-year-old nephew Marvin Johnson, his wife Dale Riley, and his mother-in-law Theta

Chalks. Each person testified regarding statements apparently made by Backer and Johnson. The testimony was presented as follows:

Marvin Johnson, age 15 at the time, is the brother of Johnson and a cousin to appellant and Backer. He testified that after petitioner, Johnson and Backer were released on burglary charges unrelated to the instant offense, he overheard a conversation between Johnson and Backer in the kitchen of his parent's house. According to him, Backer stated to Johnson that "that night they had fun with her."

Dale Riley, petitioner's wife, testified that she received a phone call from Johnson in which he told her he knew what happened and that "Duke [petitioner's nickname] shouldn't have to do time for this one," and that "[t]his affects all of us." He also told Dale that he had been afraid to say anything because Backer's friends had threatened him.

Theta Chalks, petitioner's mother-in-law, testified that she spoke with Johnson when he called over the past six months. Once when he asked to speak with Dale Riley, Dale agreed to

speak with him only if Theta would listen in on the phone conversation. According to Theta, during the conversation she overheard Dale complain to Johnson that petitioner was spending a lot of time in jail due to something Johnson and Backer had done, in which Johnson replied "Yeah, I know, and I'm sorry." Johnson then admitted that he was involved in the robbery of an old woman, but that he could not come forward as Backer's friends were threatening him.

After the testimony of the three witnesses was presented and arguments of counsel made, the trial court found the testimony of the witnesses did not constitute "other undiscovered evidence" within the meaning of the plea agreement; that corroboration in the way of physical evidence was required for petitioner to receive a 10-year reduction in his sentence.

The trial court accordingly sentenced petitioner to an aggregate term of 40 years.

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B. Further Proceedings Below

Petitioner filed a direct appeal challenging his sentence in the California Court of Appeal, Third District. Among petitioner's grounds for appeal was his contention that the trial court denied him the benefit of the bargain of the plea agreement, when it sentenced him to a term of forty years without the ten-year reduction contemplated by the agreement. The court affirmed the judgment of the trial court on July 31, 1997, and a petition for review to the California Supreme Court was denied on October 15, 1997.

On February 7, 1998, Petitioner raised the same contention in a petition for writ of habeas corpus to the Federal District Court, Eastern District of California. Over a year later, on March 26, 1999, the magistrate assigned to the case filed findings and recommendations. The magistrate found that petitioner had failed to present clear and convincing evidence as required by 28 U.S.C. 2254, subdivision (e)(10), to rebut the trial court's factual finding that the plea agreement required physical evidence.

The magistrate also found that, even in the absence of the presumption of correctness,

> [T]he terms of the agreement contemplate that corroborative evidence would be required either in the form of physical evidence or the confession of the alleged accomplices. The agreement plainly provides that physical evidence could be in one of the three forms: fingerprints, a rape kit, or other undiscovered evidence. This construction of the terms of the agreement is consistent with the circumstances under which it was made, ie., the prosecution sought corroborating, unimpeachable evidence that would ensure conviction of the accomplices. Petitioner failed to produce such evidence. He has not therefore been denied the benefit of his bargain and is not entitled to habeas relief.

Accordingly, the magistrate recommended that petitioner's application for a writ of habeas corpus be denied.

Within twenty days, Petitioner filed objections to the magistrate judge's findings and recommendations. On April 14, 1999, the district judge adopted the magistrate judge's findings and recommendations and denied petitioner's application for a writ of habeas corpus.

Shortly thereafter, petitioner filed a notice of appeal. Petitioner also filed an application for issuance of certificate of appealability to the district judge, which was denied.

On June 3, 1999, petitioner filed a Motion for Issuance of Certificate of Appealability to the Ninth Circuit Court of Appeals. Five months later, on November 3, 1999, the Circuit Court denied petitioner's request for a certificate of appealability.

REASONS FOR GRANTING THE PETITION

The decision of the circuit court of appeals denying petitioner a certificate of appealability is erroneous, and the issue it presents remains important, considering the thousands of inmates filing habeas petitions every year. Furthermore, their

remains a strong need for guidance from this Court on the threshold standard for certificates of appealability.

I. The Decision Of The Court Of Appeals Was Erroneous

The present standard set forth under the Anti-terrorism and Effective Death Penalty Act (AEDPA) provides that a certificate of appealability shall be issued upon a "substantial showing of the denial of a constitutional right." (28 U.S.C. §2253 (c)(2).)

In *Barefoot v. Estelle*, 463 U.S. 880 (1983), prior to the enactment of AEDPA, this Court held that a certificate of probable cause requires petitioner to make a "substantial showing of the denial of [a] federal right." In defining the "substantial showing" standard, this court explained: "[O]bviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor." Instead, the petitioner must demonstrate that

> [T]he issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are 'adequate to

deserve encouragement to proceed further.' (*Id.*. at 893, n. 4, citing *Gordon* v. *Willis*, 516 F.Supp. 911, 913 (N.D. Ga. 1980).)

The federal circuit courts have held that the standards governing certificates of probable cause are similar or identical to the new recent standards for certificates of appealability. (See *Hardwick* v. *Singletary*, 126 F.3d 1312 (11th Cir. 1997); *Keyes* v. *Keane*, 90 F.3d 676, 680 (2nd Cir. 1996).) The change in terminology between the old and the new standard was not intended to work as a substantive amendment. (*Lennox v. Evans*, 87 F.3d 431, 433 (10th Cir. 1996).)

In the instant case, the pertinent portion of petitioner's plea agreement stated that he would receive a 10-year reduction in his sentence "when the following occurs: corroboration regarding the identity of my accomplices by way of physical evidence in the form of fingerprints, the rape kit or other undiscovered evidence or a confession by the accomplice(s) ..."

In regard to plea agreements, this Court held that "when a plea rests in any significant degree on a promise or agreement of

the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." (*Santobello* v. *New York,* 404 U.S. 257, 262 (1971).)

Here, the district court found that petitioner failed to present clear and convincing evidence to rebut the trial court's finding that the testimony he presented from three witnesses did not constitute "other undiscovered evidence" within the meaning of the plea agreement; that the plea agreement required him instead to produce physical evidence in order to receive the 10-year sentence reduction.

The district court judge also found that notwithstanding the presumption of correctness, petitioner failed to produce the evidence required by the agreement, since the terms of the agreement contemplate that corroborative evidnece should be required either in the form of physical evidence, or the confession of the alleged accomplices.

However, an examination of the agreement *on its face* is all that is necessary to demonstrate the severity of error in the district court's findings. Petitioner acknowledges that this

Court has stated "We do not grant certiorari to review evidence and discuss specific facts." (*United States v. Johnston*, 268 U.S. 220, 227 (1925); *Texas v. Mead*, 465 U.S. 1041 (1984).) Nevertheless, this Court has granted certiorari to review matters of evidence in cases where the judgment below seems to be unconscionably wrong and thus to present substantial due process questions. (See *Thompson v. City of Louisville*, 362 U.S. 199 (1960); see also *Garner v. Louisiana*, 368 U.S. 157 (1961).)

In this case, petitioner hopes to demonstrate to this Court that the district court, with respect to the plea agreement, erred in its factual findings so severely that his due process rights were violated. Such a showing, at a minimum, should warrant issuance of a certificate of appealability. Accordingly, the analysis will proceed on the interpretation of the terms of the plea agreement.

Plea agreements must be interpreted according to principles of contract law. (*McKenzie v. Risley*, 801 F.2d 1519, 1526 (9th Cir. 1986); *United States v. Arnett*, 628 F.2d 1162, 1164 (9th

Cir. 1979).) "The terms of the agreement, if disputed, are to be determined by objective standards. (*United States v. Gerace,* 997 F.2d 1293, 1294 (9th Cir. 1993).) According to Professor Corbin, the "[l]anguage of a contract is interpreted in accordance with its generally prevailing meaning." (Rest.2d Contracts §201, comment A.)

Here, as will be demonstrated below, the district court grossly misinterpreted the terms of petitioner's plea agreement.

First, a reading of the agreement plainly indicates that the term "physical evidence" refers to the finger prints and the rape kit, and does not modify the term "other undiscovered evidence." If the term "physical evidence" modified the term "other undiscovered evidence," it would necessarily follow that the words would also modify the term "confession by accomplices," which would involve an absurdity.

Second, if the prosecution, as drafter of the plea agreement, had intended the agreement to require petitioner to produce physical evidence in order to receive the bargained-for sentence reduction, it could have easily eliminated any ambiguity

whatsoever by using the term "other undiscovered *physical* evidence," instead of the broad and over-inclusive term "other undiscovered evidence" (the term actually used by the People). The Government was required to bear the responsibility for any lack of clarity in the plea agreement. (See *United States* v. *De La Fuente*, 8 F.3d 1333, 1337 (9th Cir. 1993).)

Third, the plea agreement was absolutely silent as to whether the corroborating evidence had to result in the conviction of the alleged accomplices before petitioner received the bargained-for sentence reduction. If the prosecution actually sought evidence that would ensure conviction of the accomplices, it should have included such a term in the plea agreement requiring conviction of the accomplices; as it did not, this term cannot be found to be encompassed in the agreement.[1]

---

[1] Although the agreement also provided in part that "defendant agree[s] to cooperate with law enforcement by identifying two other participants in this crime and helping locate them and obtain statements as required (pretext phone call)"; in fact, after petitioner identified the accomplices, neither the People or law enforcement ever provided petitioner the opportunity to make a pretext phone call to the alleged accomplices.

Fourth, the circumstances in which the agreement was made are clearly that petitioner was required to corroborate his identification of the accomplices in some fashion through the use of evidence which was not available to the prosecution prior to the plea agreement being reached. As shown above, this corroborative evidence was not limited to physical evidence or a confession from the accomplices. In this regard, there is absolutely no evidence demonstrating that petitioner understood the terms of the agreement to be limited as such.

Therefore, in producing testimony from three witnesses corroborating his identification of the accomplices, the petitioner indeed produced evidence as required by the plea agreement. As a result, since petitioner did not receive the 10-year sentence reduction as contemplated by the agreement, there exists a substantial showing that he was denied a constitutional right.

"[A] guilty plea is a serious and sobering occasion inasmuch as it constitutes a waiver of the fundamental rights to a jury trial . . . to confront one's accusers ... to present

witnesses in one's defense ... to remain silent ... and to be convicted by proof by all reasonable doubt . . ." (*Santobello v. New York, supra,* 404 U.S. at 264, concurring opinion of Douglas, J.).

At a minimum, if the language of the plea agreement was ambiguous, the issue of whether petitioner was denied the benefit of the bargain in violation of due process should be considered debatable by jurists of reason. In considering whether to issue a certificate, courts should resolve doubts in favor of petitioner. (*McCoy v. Wainright,* 630 F.Supp. 122, 124 (S.D. FL. 1986), citing *Jones v. Warden, Louisiana State Penitentiary,* 402 F.2d 776 (5th Cir. 1968).) Petitioner should not be required to show that he should prevail on the merits in order to obtain a certificate of appealability. (*Barefoot v. Estelle, supra,* 43 U.S. at 893, n. 4.) Therefore, based on the above facts, a certificate pursuant to 28 U.S.C. §2253 (c)(2) should issue in this case.

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II. The Question Presented Is Important

This court has recognized that the importance of an issue may arise out of the fact that many individuals are involved or are affected by the decision below. (*Patterson v. Lamb* 329 U.S. 539 (1947).) The law pertaining to certificates of appealability affects thousands of inmates in the country who file federal habeas petitions each year. Whether a certificate is granted in a petitioner's case marks a critical point in the litigation of a habeas claim. To an inmate, the issuance of a certificate affords the precious opportunity of judicial review of the district court's order denying a petition. A denial of a certificate, for the most part, marks the end of an inmate's challenges to his conviction or sentence--which most often began at the state level.

Although the instant case involves consideration of factual issues, this Court should grant certiorari to provide further clarification of the subjective "substantial showing of the denial of a constitutional right" standard found in 28 U.S.C. §2253

(c)(2). The varying instances that support issuance or denial of a certificate warrant further guidance on this threshold standard.

Furthermore, the facts supporting petitioner's request for a certificate of appealability involve the constitutionality of a plea agreement. The plea agreement remains an essential component of the administration of justice. (*Santobello v. New York, supra,* 404 U.S. at 260.) The plea agreement, as this Court noted:

> [L]eads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned. (Citation.)

> However, all of these considerations presuppose fairness in securing agreement between an accused and a prosecutor. (*Santobello, supra,* 404 U.S. at 261, emphasis added.)

In sum, petitioner's case presents matters of importance to the courts, a large number of inmates, and the functioning of the criminal justice system overall. Therefore, the Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dean R. Johansson, Esq.
Counsel of Record

John R. Hargreaves, Esq.
Counsel for Petitioner

Hargreaves & Johansson
926 "J" Street, Suite 1119
Sacramento, CA 95814
(916) 930-9646

APPENDIX A:

28 U.S.C. §2353

§ 2253 Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from---

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A Certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

(As amended April 24, 1996, P.L. 104-132, Title I, § 102, 110 Stat. 1217.)

APPENDIX B:

Order of the Ninth Circuit Court Of Appeals

Denying Petitioner A Certificate Of Appealability,

Filed November 3, 1999

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

(Filed November 3, 1999)

MARVIN RAY RILEY, No. 99-16138

Petitioner-Appellant DC# CV-98-00255-FCD

v. Eastern California

R.Q. HICKMAN; Sacramento

ATTORNEY GENERAL, ORDER

Respondent-Appellee.

_____/

Before: WALLACE and LEAVY, Circuit Judges

The request for a certificate of appealability is denied.

See 28 U.S.C. § 2253 (c)(2).

APPENDIX C:

Order of the District Court

Denying Petitioner A Certificate Of Appealability,

Filed May 14, 1999

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

(Filed May 14, 1999)

MARVIN RAY RILEY,

Petitioner, No. CIV S-98-0255 FCD JFM P

vs.

R.Q. HICKMAN, et al.,

Respondents. ORDER

_____/

Petitioner, a state prisoner proceeding with counsel, has timely filed a notice of appeal of this court's April 14, 1999 denial of his application for a writ of habeas corpus. Before petitioner can appeal this decision, a certificate of appealability must issue. 28 U.S.C. § 2253(c); Fed.R.App.P.22(b).

A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2).

The court must either issue a certificate of appealability indicating which issues satisfy the required showing or must state the reasons why such a certificate should not issue. Fed. R. App. P. 22(b).

For the reasons set forth in the magistrate judge's March 26, 1999 findings and recommendations, petitioner has not made a substantial showing of the denial of a constitutional right. Accordingly, a certificate of appealability should not issue in this action.

IT IS SO ORDERED.

DATED: May 12, 1999.

(Signature)

UNITED STATES DISTRICT JUDGE

APPENDIX D:

Order And Judgment Of The District Court Denying

Petitioner's Application For A Writ Of Habeas Corpus,

Filed On April 14, 1999

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

(Filed on April 14, 1999)

JUDGMENT IN A CIVIL CASE

Marvin Riley

v. No. CIV S-98-255 FCD JFM P

R Q Hickman et al

XX – Decision by the Court. This action came to trial or hearing before the court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF 3/14/99.

Jack L. Wagner, Clerk of the Court

Entered: April 14, 1999

By: M Stiehl, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

(Filed April 14, 1999)

MARVIN RAY RILEY,

Petitioner, No. CIV S-98-0255 FCD JFM P

vs.

R.Q. HICKMAN, et al.,

Respondents. ORDER

_____/

Petitioner, a state prisoner, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United Stotes Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On March 26, 1999, the magistrate judge filed findings and recommendations herein which were served on all parties

and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. Petitioner has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed March 26, 1999, are adopted in full; and

2. Petitioner's application for a writ of habeas corpus is denied.

DATED: April 13, 1999.

(Signature)

UNITED STATES DISTRICT JUDGE

APPENDIX E:

Findings And Recommendations Of Magistrate

Filed March 26, 1999

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

(Filed March 26, 1999)

MARVIN RAY RILEY,

Petitioner, No. CIV S-98-0255 FCD JFM P

vs.

R.Q. HICKMAN, et al.,

Respondents. FINDINGS AND

_____/ RECOMMENDATIONS

Petitioner is a state prisoner proceeding with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges the sentence imposed on him pursuant to a plea agreement. Petitioner contends that he has not received the benefit of his plea agreement because he was sentenced to a term of forty years without the ten-year reduction contemplated by the agreement. For the reasons set out below, this court recommends that petitioner's application for a writ of habeas corpus be denied.

FACTUAL BACKGROUND

The following facts are drawn from the opinion of the California Court of Appeal for the Third Appellate District, attached as Exhibit A to Respondent's Answer:

> On the evening of September 19, 1994, defendant entered the trailer home of 81-year-old Lucy K., grabbed her from behind, put a wet towel around her head and neck, and forced her onto her bed. There, he bound her hands behind her back with electrical tape, taped her eyes, stuffed a washcloth in her mouth and removed her clothing. Defendant then began a prolonged sexual assault of the victim, during which he held a serrated knife to her throat, hit her on the side of her head with a flashlight, choked her with a towel and threatened her with a broom handle. After the sexual assault, defendant took $300.00 from the victim's purse and threw her about the room because he wanted more money.

Police found the trailer's telephone cord had been cut and defendant's fingerprints were on a piece of electrical tape and an envelope.

Defendant was charged with three counts of forcible oral copulation (§ 288a, subd. (c)), first degree robbery (§§ 211 and 212.5), first degree burglary (§ 459), assault with a deadly weapon and by means likely to produce great bodily injury (§ 245, subd. (a)(1)), injury of telephone lines (§ 591), forcible rape (§ 261, subd. (a)(2)), abuse of an elder (§ 368, subd. (a)), false imprisonment by force (§§ 236 & 237), six recidivist elder abuse enhancements (§ 667.9), nine deadly weapon use enhancements (§ 12022.3, subd. (a) & § 12022, subd. (b)), a serious felony conviction (§ 667, subds. (b)-(i)), and an on-bail enhancement (§ 12022.1, subd. (b)).

Before his preliminary hearing, defendant agreed to accept a negotiated disposition in which

he would plead no contest to one count of forcible oral copulation, rape and robbery and admit an elder abuse enhancement, two deadly weapon use enhancements, and one serious felony conviction. In return, the remaining charges in this and two other cases would be dismissed, and defendant would receive a 40-year prison term.

Defendant's plea agreement contained one final provision: '[Defendant] agree[s] to cooperate with law enforcement by identifying the two other participants in this crime and helping locate them and obtain statements as required (pretext phone call). [Defendant] will further cooperate by providing a full statement concerning the facts of the robbery and rape of Lucy [K.] and any follow up interviews by law enforcement as needed. [Defendant] agrees to testify at the trial of all other participants of this crime.'

'In exchange for [defendant's] cooperation [his] forty year sentence will be reduced by ten years to thirty years when the following occurs: corroboration regarding the identity of [his] accomplices by way of physical evidence in the form of fingerprints, the rape kit or other undiscovered evidence or a confession by the accomplice(s) and [defendant testifies] at trial if necessary. [Defendant] agrees to waive time for sentencing for at least twelve weeks or after the trial of [his] accomplices if necessary.'

ANALYSIS

It is well settled that when a guilty plea or plea of nolo contendere rests in any significant degree on the promise or agreement of the prosecutor so that it can be said to be part of the inducement or consideration for the plea, the promise must be fulfilled. Santobello v. New York, 404 U.S. 257 (1971). Plea agreements are interpreted according to principles of contract law. McKenzie v. Risley, 801 F.2d 1519, 1526 (9th Cir.

1986); United States v. Arnett, 628 F.2d 1162, 1164 (9th Cir. 1979). "The terms of the agreement, if disputed, are to be determined by objective standards." United States v. Gerace, 997 F.2d 1293, 1294 (9th Cir. 1993).

Petitioner here contends that his due process rights were violated because he provided "other undiscovered evidence" as called for by the plea agreement but did not receive the ten-year reduction in his sentence. The evidence petitioner provided consisted of the testimony from three of petitioner's relatives. His 15-year old nephew testified that Jacob Backer made a statement "That night they had fun with her" but did not identify the woman or explain what he was talking about. Petitioner's wife testified that Henry Johnson, in a telephone conversation, stated petitioner "shouldn't have to do the time for this one" and that he had been threatened by Jacob Backer's friends. Petitioner's wife, however, acknowledged that Henry Johnson never stated he participated in the crime at issue. Finally, petitioner's mother-in-law testified that she listened in on the telephone conversation as testified to by petitioner's wife.

Petitioner's mother-in-law further testified that Henry Johnson stated he had been involved in a robbery but she did not know if the robbery was the September 19, 1994 robbery or the September 22, 1994, for which Johnson was arrested.

The trial court found this testimony did not constitute "other discovered evidence" within the meaning of the plea agreement. The terms of the agreement included "corroboration regarding the identify of [the] accomplices by way of physical evidence in the form of fingerprints, the rape kit or other undiscovered evidence or a confession by the accomplices(s) and [the testimony of defendant] at trial if necessary." The trial court construed the plea agreement to require physical evidence. This factual finding is presumed to be correct; that presumption can be rebutted only by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Petitioner fails to present such evidence.

Even in the absence of the presumption of correctness, however, this court also finds that petitioner failed to produce the evidence required by the plea agreement. The terms of the plea agreement contemplate that corroborative evidence would

be required either in the form of physical evidence or the confession of the alleged accomplices. The agreement plainly provides that the physical evidence could be in one of three forms: fingerprints, a rape kit, or other undiscovered evidence. This construction of the terms of the agreement is consistent with the circumstances under which it was made, i.e. the prosecution sought corroborating, unimpeachable evidence that would ensure conviction of the accomplices. Petitioner failed to produce such evidence. He has not therefore been denied the benefit of his bargain and is not entitled to habeas relief.

Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas corpus be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and

Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: March 24, 1999.

(signature)

UNITED STATES MAGISTRATE JUDGE